workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company.

I therefore find that the Industrial Court had not misdirected itself in law and jurisdiction or misapprehended the facts before it when making the ruling in the award. I dismissed the applicant's claim with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; Lobo & Associates.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Tan Choon Ang

HIGH COURT (KUCHING) — CRIMINAL REVISION NO KG 2 OF 1988
HAIDAR J
2 NOVEMBER 1989

Criminal Procedure — Preliminary inquiry — Duty of magistrate to decide if there is credible evidence — Not required to assess credibility of witnesses — Duty to decide on admissibility of cautioned statement — 'Magistrate' to include 'President' — Criminal Procedure Code (FMS Cap 6), ss 139(i), 140, 141 & 143(b)

The accused was charged under s 302 of the Penal Code (FMS Cap 45) for murder. At the end of the preliminary inquiry, the magistrate amended the charge to one under s 304 of the Penal Code (FMS Cap 45) and directed that the accused be tried before the sessions court. The deputy public prosecutor applied to the High Court to exercise its revisionary powers and set aside the order as there were sufficient grounds to commit the accused for trial on the original charge.

Held, affirming the order of the magistrate:

(1) The relevant powers of a magistrate in a preliminary inquiry are contained in Chapter XVII of the Criminal Procedure Code (FMS Cap 6), in particular ss 140 and 141. The duty of a magistrate in a preliminary inquiry is to consider if there is credible evidence to commit the accused for trial in the High Court.

(2) A preliminary inquiry is not a trial and it is not the duty of the magistrate to be satisfied that the prosecution has established a prima facie case. Neither is the magistrate required to assess the credibility of the witnesses or to contemplate the accused's possible defence.

(3) It is the duty of the magistrate to decide on the admissibility of a cautioned statement. As the defence in the instant case did not seriously challenge the admissibility of the cautioned statement, the magistrate was entitled under s 139(i) of the Criminal Procedure Code (FMS Cap 6) to look at the evidence of the cautioned statement to see if there was credible evidence against the accused. However, it is not the function of the magistrate to evaluate which evidence to accept or to reject but to leave such doubts for the trial court to resolve.

(4) On the evidence presented by the prosecution, there was insufficient evidence to constitute the ingredients of the charge under s 302. Apart from the cautioned statement of the accused and evidence that the accused befriended the deceased, there was no evidence to show that the accused was last seen with the deceased immediately before the death.

(5) A magistrate may, when a preliminary inquiry discloses an offence triable by a sessions court, frame a charge for that offence, and transfer the case for hearing before a president of a sessions court. The word 'magistrate' in s 140(i)(b) of the Criminal Procedure Code (FMS Cap 6) would include 'president'.

Cases referred to

1 *Re Low Kuan Meng* [1962] MLJ 265 (folld)
2 *In Re Pang Po Pah* [1985] 2 MLJ 214 (folld)
3 *Re Osman bin Abdullah* [1954] MLJ 237 (refd)
4 *PP* v *Ng Goh Weng & Anor* [1979] 1 MLJ 127 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 139(i), 140, 141, 143(b)

Nik Suhaimi (Deputy Public Prosecutor) for the Public Prosecutor.

Anthony Tai for the accused.

Cur Adv Vult

Haidar J: The accused, Tan Choon Ang alias Tan Choon Yeong, was charged in the magistrate's court for an offence under s 302 of the Penal Code (FMS Cap 45) ('the Penal Code') for the murder of one Lam Po Oi on 4 May 1987 at about 6.25pm, at the Anglican Cemetary, 13 km Batu Kitang Road, Kuching. At the end of the preliminary inquiry, the learned magistrate amended the said charge to one under s 304 of the Penal Code and directed that the accused be tried before the sessions court and made the order of transfer of the case accordingly.

Encik Abdul Rahman, the deputy public prosecutor, vide letter dated 29 December 1988, urged the court to exercise its revisionary powers to set aside the order made by the learned magistrate on the ground that she had erred in law in not committing the accused to the High Court as there are sufficient grounds to commit the accused for an offence under s 302 and to direct her accordingly. In view of the application of the deputy public prosecutor, I agreed to call for the record of the proceedings so as to satisfy myself of the legality or otherwise of her order.

On 4 September 1989, I heard the arguments of the deputy public prosecutor and defence counsel wherein I reserved my judgment. I now proceed to give my judgment.

The relevant powers of a magistrate in a preliminary inquiry are spelt out in Chapter XVII of the Criminal Procedure Code (FMS Cap 6) ('CPC'), the relevant provisions for the purpose of this revision being ss 140 and 141. Section 140(i) reads:

When the evidence referred to in the last preceding section has been taken *the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him, unless it appears to the Magistrate that such person should be tried before himself or before some other Magistrate* in which case he shall either —

(a) forthwith frame a charge in writing and call upon the accused to plead thereto; or
(b) *order the accused to be tried before some other Magistrate.* (Emphasis added.)

Section 141(i) reads:

If after taking the evidence for the prosecution the Magistrate is of opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence or offences the accused is charged.

The legislature, in my view, by the use of the phrase 'sufficient grounds', would seem to imply that the duty imposed on a magistrate in a preliminary inquiry is to consider whether there is sufficient evidence adduced by the prosecution to commit the accused for trial in the High Court under s 143(b) or take action in accordance with s 140(i)(a) or (b) of the CPC as may be applicable. By sufficient evidence, it would, in my view, mean that the evidence must necessarily be credible evidence. Therefore, with respect, the use of such phrase as 'prima facie case' may tend to be a bit confusing and misleading as the role of a magistrate in a preliminary inquiry is only inquisitorial as is borne out by s 139(i) of the CPC which reads:

When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and *to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.* (Emphasis added.)

As a preliminary inquiry is not a trial (see *Re Low Kuan Meng*[1]), it is not the duty of the magistrate to be satisfied that the prosecution has to establish a prima facie case or that it be proved beyond reasonable doubt — that is, the function of a trial court of appropriate jurisdiction. Neither is he expected to assess the credibility of the witnesses or to contemplate the accused's possible defence. In *Re Pang Po Pah*,[2] Wan Yahya J, inter alia, said:

Once the bare ingredients of any offence triable by the court of a judge has been presented to him, his duty is to make the order of committal and not usurp the more intricate duty of assessing the credibility of facts from the body so authorized to perform that function, ie the jury.

According to Bellamy J in *Re Osman bin Abdullah*:[3]

It is no part of the inquiring magistrate's duty to consider possible lines of defence to the charge which the accused may raise in the course of the inquiry or to decide whether there are sufficient grounds for convicting the accused.

The issue here is — has the prosecution adduced credible evidence for the magistrate to invoke s 143(b) of the CPC, ie to commit the accused for trial before the High Court as the prosecution is urging the court to do in this case or was the magistrate right in exercising her powers under s 140(i)(b) of the CPC?

It is then appropriate for me to examine the record of the proceedings of the preliminary inquiry in order to satisfy myself that the magistrate had made the right order, having regard to the law and the authorities, before disturbing her order under my revisionary powers.

Apart from the cautioned statement of the accused (P10), the evidence that connects the accused to the deceased is that the accused befriended the deceased and there is no evidence even to show that the accused was last seen with the deceased *immediately* before the death. In respect of the cautioned statement, the defence counsel after consulting the accused, placed on record his objection to the admissibility of the cautioned statement, and setting out the grounds thereof and decided to reserve the trial within a trial of the admissibility of his cautioned statement for the High Court to determine. According to Suffian LP (as he then was) in *PP* v *Ng Goh Weng & Anor*[4] at p 128, it is indeed the duty of the magistrate in law to decide on the admissibility of the cautioned statement subject to what they had to say. The stand taken by the accused in respect of his cautioned statement has placed the position of his cautioned statement in a tricky situation. Is the magistrate entitled to look at the cautioned statement presented by the prosecution as part of the evidence in view of the stand taken by the defence or to leave it to the High Court? As the defence did not, at the stage of the preliminary inquiry, seriously challenge the admissibility of the cautioned statement by having a trial within a trial, in my view, the magistrate can look at the evidence of the cautioned statement to see whether there is credible evidence against the accused by virtue of s 139(i) of the CPC, that is, 'to take all such evidence as may be produced in support thereof and *such other evidence as the magistrate may think fit to call for*'. (Emphasis added.) In fact in his submission, the defence counsel touched on the contents of the cautioned statement to the effect that it did not disclose the ingredients of the offence with which the accused is charged.

In the cautioned statement, the accused said that there was a quarrel between him and the deceased and bricks were thrown and eventually the deceased fell on the bricks and sustained serious injuries on the head and became motionless. He panicked and, seeing a few gunny sacks there, decided to wrap the deceased's body and placed it down at one end of the bridge. The medical evidence did not show how those injuries could have been sustained by the deceased other than the cause of death. If the medical evidence had shown that such injuries could not have been sustained as described by the accused, then it is not the function of the learned magistrate to evaluate which evidence to accept or reject but to leave such doubt

for the trial court having jurisdiction to resolve. I regret to say that the preliminary inquiry was very badly conducted by the prosecution. It is the duty of the prosecution, in my view, to assist the magistrate by presenting credible evidence so as to constitute sufficient grounds for the accused to be committed for the offence of murder, as in this case, to the High Court. On the evidence presented by the prosecution before her, I am of the opinion that she was right to rule that there is insufficient evidence to constitute the ingredients of the charge under s 302, an offence triable by the High Court.

What then is the next option open to her? She decided to invoke her powers under s 140(i)(b) of the CPC by preferring a charge under s 304 of the Penal Code and had it transferred to the sessions court, the court having jurisdiction for such offence. However, s 140(i)(b) of the CPC reads:

> ... order the accused to be tried before some other magistrate.

Section 140(i)(b) of the CPC was extensively and carefully considered by Wan Yahya J (as he then was) in the case of *Re Pang Po Pah*,[2] where his Lordship held that the learned magistrate may, when the preliminary inquiry evidence discloses an offence triable by a sessions court, frame a charge for that offence and, in accordance with s 140(i)(b) read with s 177 of the CPC, transfer the case to be tried by a president of the sessions court, giving an extended meaning to the word 'magistrate' to include 'president' (or now 'judge'). I am in full agreement with the interpretation of s 140(i)(b) of the CPC by my learned brother.

In the circumstances, I am of the opinion that the learned magistrate had rightly invoked her powers under s 140(i)(b) in view of the evidence presented by the prosecution in the preliminary inquiry, though perhaps it would appear that she had erred in her reasons for making such an order. From a perusal of the record of the preliminary inquiry, I am satisfied that there are no valid grounds for me to disturb her order and accordingly I affirm her said order and would direct the accused to appear before the sessions court, Kuching, on 13 November 1989 to be dealt with according to law. His bail is extended to 13 November 1989.

Order accordingly.

Solicitors: *Anthony Tai Advocates.*

Reported by *Mathavan Devadas*

Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener)

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D2-28-70-89
SITI NORMA YAAKOB J
1 NOVEMBER 1989

Companies and Corporations — Winding up — Delay — Whether unreasonable — Locus standi of petitioner — Right of intervener to consolidate shares in respondent in manner asked for in amended petition of restructure — Central Bank of Malaysia Ordinance 1958, s 31c

Civil Procedure — Jurisdiction of court to vary own order — When court becomes functus officio

The petitioner is the registered holder of 1,000 shares in the respondent company. As a minority shareholder, he complained that the affairs of the respondent have been conducted in a manner oppressive to him and brought a winding-up petition within s 181(1)(a) of the Companies Act 1965. In December 1984, the present management took over the control of the respondent and made two allotments of shares to themselves amounting to 8,274,000 shares at a nominal value of $1 per share, thus making a hefty profit for themselves. The petitioner and the other minority shareholders were never informed nor given the chance to apply for such allotments and neither have they been paid any dividends.

On 16 January 1989, the intervener assumed control of the respondent under s 33(iii) of the Finance Companies Act 1969 so as to facilitate the capital restructuring of the respondent by reducing its paid-up capital under s 31c of the Central Bank of Malaysia Ordinance 1958. The intervener then filed Originating Petition 26-13-89 on 17 March 1989 for that very purpose, and then proceeded to apply: first, to intervene in this winding-up petition; and secondly, that the winding-up petition be stayed or heard together with the intervener's petition. On 25 March 1989, the respondent obtained an ex parte interim injunction restraining the petitioner from proceeding further with the winding-up petition. On 3 April 1989, the intervener was granted leave to intervene and an order was made that the winding-up petition and restructuring petition be heard together. On 20 June 1989, the intervener filed another motion to have that part of the intervention order obtained on 3 April 1989 varied to the extent that its restructuring petition be heard and determined notwithstanding the petitioner's unreasonable delay in getting his petition ready for hearing together with the restructuring petition.

Held, allowing the intervener's motion:

(1) Since 3 April 1989, the petitioner had not done anything to have his petition ready for adjudication together with the intervener's petition. Neither had he given any reason why he had failed to take any steps to have his petition ready for adjudication or given any indication when he would do so. Under the circumstances, his conduct had been most unreasonable and thus his petition should not stand in the way of the intervener's petition.

(2) A court becomes functus officio when it has already made a final pronouncement on the rights of the parties appearing before it. This must be distinguished from orders which are in the nature of directions as to how future proceedings on the cause of action are to be conducted which can be varied by the